In the United States Court of Appeals for the Ninth Circuit

No. 12523

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,
APPELLANT

v.

ARCHIE F. MCLEAN, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR APPELLANT AND APPENDICES

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JURISDICTIONAL STATEMENT

This action was instituted in the U. S. District Court for the District of Idaho, Southern Division, against Oscar Ewing, Federal Security Administrator, pursuant to Section 205 (g) of the Social Security Act as amended (42 U. S. C. 405 (g), 53 Stat. 1360, 1370), to review the Administrator's final decision denying the plaintiff's request for revision of his wage record so as to include therein compensation alleged to have been received by him for services rendered Albert Miller and Company in 1941 and 1942. The defendant filed a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

The jurisdiction of this court to review the judg-

ment of the district court is sustained by Section 205 (g) of the Social Security Act as amended and by 28 U. S. C. 1291.

STATEMENT OF THE CASE

This is an appeal from an order and final judgment of the U. S. District Court of the District of Idaho, Southern Division, reversing the decision of the Federal Security Administrator[1] and remanding the case to him with directions to revise the wage records maintained by the Social Security Administration with respect to the plaintiff's wages, so as to include in said wage records payments of compensation made to the plaintiff by Albert Miller and Company during the last quarter of 1941 and during 1942, and providing that upon such remand the Federal Security Administrator should take further proceedings not inconsistent with that judgment.[2]

[1] The administration of Title II of the Social Security Act was originally vested in the Social Security Board. By the President's Reorganization Plan No. 2, effective July 16, 1946 (Section 4, House Document 595, 79th Congress, 2d Sess., 11 F. R. 7873, 60 Stat. 1095, set out in note under Section 133y–16 of Title 5, U. S. C.) it was abolished and its functions transferred to the Federal Security Administrator. The Social Security Administration is the operating branch of the Federal Security Agency which administers Title II of the Social Security Act. The Bureau of Old-Age and Survivors Insurance and the Office of the Appeals Council are constituent units of the Social Security Administration.

[2] The District Court's decision in this case as a judicial precedent that services such as those of McLean come within the rule of the *Burger* case, *infra*, p. 4, (and hence constitute covered employment under the Act) affects approximately 25,000 wage earners engaged in the processing of fresh fruits and vegetables in the employ of commercial handlers. It affects the question of the coverage of such wage earners both with respect to Title II benefit provisions of the Social Security Act and the related taxing provisions admin-

The decision reversed by this judgment found that the services performed by the plaintiff for Albert Miller and Company in 1941 and 1942 were "agricultural labor," as defined in Section 209 (l) (4) of the Social Security Act as amended [42 U. S. C. 409 (l) (4), 53 Stat. 1360, 1377] and therefore were excepted from "employment" as defined in Section 209 (b) of that Act, and that consequently compensation paid him for such services were not "wages" to be included in his wage record as defined in Section 209 (a) of said Act.

SPECIFICATION OF ERRORS RELIED UPON

The district court erred:

1. In failing to hold that the services performed by the wage earner, Archie F. McLean, for Albert Miller & Company, a Chicago corporation, at its Burley, Idaho, warehouse were properly considered by the Federal Security Administrator to be "agricultural labor" as defined in Section 209 (l) (4) of the Social Security Act, as amended (42 U. S. C. 409 (l) (4) and in the corresponding tax statute, Chapter 9A of the Internal Revenue Code, 26 U. S. C. 1426 (h) (4) so that the payments he received therefor during the last calendar quarter of 1941 and during 1942 were properly excluded from wage credits.

2. In failing to hold that plaintiff's services were performed prior to the delivery of the potatoes to a

istered by the Bureau of Internal Revenue. If upon reconsideration of its decision in the *Burger* case, *infra*, p. 4, this court should determine to overrule it, the number of wage earners affected will of course be much greater. The case therefore involves an issue deserving of serious consideration.

terminal market and as an incident to the preparation of such potatoes for market.

3. In holding that the Burley, Idaho, warehouse of Albert Miller & Co. was a terminal market for distribution for consumption.

4. In holding that the plaintiff's services were performed after the potatoes had reached the (a) grower's market or (b) the terminal market.

5. In failing to hold that the washing, sorting, and grading operations performed by plaintiff at the Burley, Idaho, warehouse were performed as an incident to the preparation of such potatoes for market within the meaning of Section 209 (l) (4) of the Social Security Act, as amended, 53 Stat. 1377, and within the meaning of the Social Security Administration Regulations No. 3, Part 403, Title 20 CFR, Sec. 403.808 (e).

6. In concluding that the decision of the Ninth Circuit Court of Appeals in *Miller* v. *Burger,* 161 F. (2d) 992, dealing with the workers of a commercial handler purchasing fruit outright, is controlling here, where the washing, sorting, and grading of the potatoes was incident to their preparation for market and was necessarily performed by plaintiff as the statutory agent of the farmer grower prior to completion of which operations title to the potatoes remained in the farmer grower.

7. In substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and corresponding tax provisions.

8. In disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when the Burley, Idaho, warehouse of Albert Miller & Co. received the unwashed, unsorted, and ungraded potatoes that they were then in a merchantable state and that the farmer growers had parted with all economic interest and title therein.

9. In not holding that the Social Security Act makes no distinction between the farmer growers of fresh vegetables and the commercial handlers thereof, insofar as the latter performs for such farmer-grower services incident to the preparation of such vegetables for market (a) thereby nullifying the exception of services such as washing, sorting, and grading, incident to the preparation of vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due the expertness of the Federal Security Administrator, and (b) invalidating the Regulations promulgated by the Social Security Administration.

10. In holding that Albert Miller & Co. was not the statutory agent of the farmer grower for the performance of the washing, sorting, and grading operations.

11. In denying defendant's motion for summary judgment and in reversing and remanding the cause.

STATUTES AND REGULATIONS INVOLVED

For the convenience of the court, the statutes and regulations herein involved are assembled in Appendix B attached hereto (pp. 75–80, *infra*).

Prior to 1940, Title II of the Social Security Act excepted "agricultural labor" from employment without defining it. Section 210 (b) (1) of the Act of August 14, 1935, 49 Stat. 625. Effective January 1, 1940 (42 U. S. C. 409 (b)), agricultural labor was given a statutory definition in Section 209 (l) of the Act as amended (42 U. S. C. 409 (l), 53 Stat. 1377) which provides in pertinent part as follows, for the period beginning January 1, 1940:

> (l) The term "agricultural labor" includes all service performed—
>
> (4) *In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity;* but only if such service is performed as an incident to ordinary farming operations or, *in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market.* The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. [Italics supplied.]

Social Security Administration Regulations No. 3, Part 403, Title 20, CFR, Section 403.808 (e) provides as follows:

> (e) Services described in Section 209 (1) (4) of the Act:
>
> (1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, processing, freezing, grading, storing, or delivering to storage or to market, of any agricultural or horticultural commodity, other than fruits, and vegetables (see subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.
>
> Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organiza-

tion or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2) above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for consumption.

The Social Security Board Regulation No. 2, July 20, 1937, governing the period up to December 31, 1939, Title 20, CFR, Section 402.6 provided as follows:

Agricultural labor. The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising,

feeding, or management of live stock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute agricultural labor, however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges and orchards.

Forestry and lumbering are not included within this exception.

Treasury Regulation 91, Article 6, 26 CFR, Chapt. I, Section 401.6, governing the period up to December 31, 1939, provided as follows:

Agricultural labor. The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding, or management of live stock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which

were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute agricultural labor, however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, and orchards.

Forestry and lumbering are not included within the exception granted by section 811 (b) of the Act.

QUESTIONS PRESENTED

1. Was the appellee, Archie F. McLean, engaged in "agricultural labor" as defined in Section 209 (b) (1) of the Social Security Act, as amended [42 U. S. C. § 409 (b), 53 Stat. 1360, 1377] during the last quarter of 1941 and during 1942, and hence excepted from "employment" as defined in Section 209 (b) of that Act [42 U. S. C. 409 (b)]?

2. Is the question of coverage of the appellee herein under Section 209 (b) (1) of the Social Security Act, as amended [42 U. S. C. § 409 (b), 53 Stat. 1360, 1377], controlled by *Miller* v. *Burger,* 161 F. (2d) 992 (C. A. 9)?

3. Was the Burley, Idaho, potato warehouse and processing plant of Albert Miller & Company a "terminal market" within the intent and meaning of the 1939 amendments to the Social Security Act, 42 U. S. C. § 409 (l) (4), 53 Stat. 1377, 1378?

4. Had the farmer-growers of the potatoes herein parted with all of their economic interest in the potatoes upon the taking possession thereof by Albert Miller & Company through their Burley, Idaho, agents, prior to the washing, sorting, and grading of said potatoes?

5. What is the geographic scope of the test to be applied to determine the point at which the ordinary grower of potatoes customarily parts with his economic interest in his product?

THE ADMINISTRATIVE PROCEEDINGS

The plaintiff filed with the Bureau of Old-Age and Survivors Insurance of the Social Security Administration a request to have his wage record, as kept by the Bureau, revised to include therein wages alleged to have been paid him by Albert Miller and Company (Supp. Tr. 127–130). The Bureau denied the request (Supp. Tr. 134). Upon his request a hearing was held before a referee of the Social Security Administration on March 26, 1946 (Supp. Tr. 112–120). On July 8, 1946, the referee affirmed the decision of the Bureau (Supp. Tr. 99–107). On March 25, 1948, the plaintiff requested the Appeals Council of the Social Security Administration to review that decision (Supp. Tr. 97). On July 2, 1948, the Appeals Council affirmed the decision (Supp. Tr. 75–79).

In conformity with the practice of the Federal Security Administrator that decision became his final decision.

THE PROCEEDINGS IN THE DISTRICT COURT

This action was begun on August 31, 1948, to review the decision of the Federal Security Administrator (Tr. 2–8). In due time the defendant filed his answer to the complaint, including the complete transcript of the administrative record (Tr. 15–21). In view of the limited nature of the judicial review in proceedings authorized by Section 205 (g) of the Social Security Act and of the fact that the record before the court consists only of the pleadings, including the transcript of the administrative record, the Administrator moved for summary judgment under Rule 56 (b) of the Federal Rules of Civil Procedure (Tr. 23). The District Court rendered judgment reversing the decision of the Administrator and remanding the case to him with directions as aforesaid (Tr. 53). It wrote no opinion.

THE FACTS

The plaintiff performed services for Albert Miller and Company in November and December 1941, and in every month of 1942 with the exception of June, July, August, and December (Supp. Tr. 169–170). Albert Miller and Company, a corporation, had its principal office in Chicago, Illinois, and was designated as a "car-lot potato distributor" (Supp. Tr. 169). The plaintiff was employed in a warehouse owned by it in Burley, Idaho. The activities carried on by the company at said warehouse consisted of

washing, sorting, grading, packaging, storing, and shipping in carload lots, potatoes which it bought of potato growers in the vicinity. Approximately 45 percent of the activities in which the plaintiff engaged consisted of washing operations and 55 percent of grading operations. The growers store the potatoes, when harvested, in their cellars. Potatoes are sold as U. S. No. 1's and U. S. No. 2's. The company would buy a cellar full of potatoes, either before or after they had been sorted and graded (Supp. Tr. 102–103). The referee said,

> The record does not disclose exactly what percentage of the potatoes were sorted and graded in the farmer's cellar and what portion were sorted and graded in the company's warehouse, and it is not unreasonable to assume that approximately one half of the potatoes handled were purchased and paid for on the basis of measurement or sorting and grading in the farmer's cellar, and the other half paid for on the basis of sorting and grading in the warehouse. Regardless of how they were purchased and paid for, they were all brought into the warehouse for the purpose of further sorting and grading and washing. The first function of the warehouse operation was to feed all of the potatoes through the washer, then to sort them into two grades above noted. The U. S. No. 1's were then packed in 100-pound sacks, with the exception of the choice and largest potatoes which were packed in 10-pound and 25-pound sacks. Immediately after such packing in sacks, they were either shipped in carload lots to various U. S. markets as directed

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> by the home office, or were stored in the basement of the company's warehouse awaiting developments in the potato market. * * * It is customary in the production of potatoes in the district in which the company's warehouse is situated for the farmers to harvest their potatoes and place them in storage cellars. At that point they are not as yet ready for distribution to the consuming public, as potatoes there raised are sold in two grades; to wit, U. S. No. 1's and U. S. No. 2's. The farmer stores them in bulk without sorting or grading them. The potatoes are not sorted or graded until they come into the hands of the company. The company sorts and grades them either in the farmer's cellar or in its own warehouse after trucking the potatoes to its warehouse from the farms at its own expense. * * * At certain seasons of the year some of these potatoes are placed in storage in the warehouse, which warehouse has a capacity of approximately 50,000 sacks in its basement. They remain there for some indefinite time and are shipped from time to time as orders and directions for such shipments are received from the Chicago office. It is evident from the facts in this case, and the referee finds, that potatoes handled by the company in its Burley warehouse were not fully prepared for market until they were washed and finally sorted and graded, and it is therefore the finding of this referee that the operations of the company in its Burley warehouse were incident to the preparation of potatoes for market (Supp. Tr. 103, 106–107).

These findings were adopted by the Appeals Council (Supp. Tr. 76), but instead of the referee's finding

that all shipments, with the exception of some shipments which were consigned from the warehouse to Chicago, were made in carload lots to jobbers in various cities, who distributed them to retailers and dealers, the Appeals Council made the following finding:

> The evidence received by the Appeals Council subsequent to the referee's decision indicates that approximately 60 percent of the potatoes which were purchased locally by the management of the company's warehouse in Burley, Idaho, were shipped to various points in the United States upon directions received from the company's Chicago office and that approximately 40 percent of such potatoes were sold by the manager of the Burley warehouse, under general authority given him by the company, to local produce companies, local, intrastate, and interstate transportation companies, restaurants, stores, and private individuals; that most of the potatoes which were sold locally from the warehouse had been purchased directly from the growers, having been sorted and graded in the growers' cellars and were not washed and sorted in the warehouse (Supp. Tr. 76–77).

On the question whether the company paid for the potatoes before or after they were graded neither the referee nor the Appeals Council made a finding, but we believe that there is abundant evidence in the record to prove that there was a wide variation in the price of U. S. No. 1 and U. S. No 2 potatoes and that in most instances they were not paid for

until after they were sorted. If the farmer wanted to sell them in the cellar ungraded, the company would pay him so much for the whole cellar, but that happened only in a very small percentage of cases [See testimony of Louise Franden, Supp. Tr. pp. 73–75, 157–163, 166–168; testimony of Marie C. Buckholz, Tr. p. 72].

THE CONTENTIONS OF THE PARTIES

The issue in this case is whether, under the circumstances above set forth, the services performed by the plaintiff for Albert Miller and Company at its warehouse in Burley, Idaho, were services performed in the handling and grading of potatoes as an incident to their preparation for market and before their delivery to a terminal market for distribution for consumption within the meaning of Section 209 (l) (4) of the Social Security Act, as amended and Social Security Administration Regulations No. 3, Part 403, Title 20 CFR, Section 403.808 (e) and Section 1426 (h) (4) of the Internal Revenue Code, 53 Stat. 1387, which are identical and provide that all services performed—

> In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this

> paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.[3]

are excepted from "employment" as defined in those Acts. If they are so excepted, the remuneration paid the plaintiff for such services was not "wages" as defined in the Act and the plaintiff is not entitled to have such remuneration included in the wage record maintained for him by the Social Security Administration on the basis of which his entitlement to benefits under the Social Security Act and the amount of such benefits is determined.

The court below held on the authority of the decision of this court in *Miller* v. *Burger,* 161 F. (2d) 992 (C. A. 9), that his services were not excepted from "employment" by the section above quoted.

Appellee will no doubt argue that that decision should be affirmed. Appellant contends it should be

[3] H. R. 6000, the Social Security Act Amendments of 1950, which will probably have been enacted before this cause is argued, defines "agricultural labor" in entirely different terms, but since the new definition does not become effective until January 1, 1951, and is not retroactive, it will not affect the issues in this case. The Federal Security Agency will have to decide for many years to come whenever a wage earner who performed services in connection with the handling of fruits or vegetables between January 1, 1940, and December 31, 1950, applies for benefits under the Act whether he was engaged in "agricultural labor." The same question will have to be decided by the Bureau of Internal Revenue if employers who have paid Social Security taxes file claims for refund.

reversed because (1) the decision in *Miller* v. *Burger* was not well considered and should therefore be overruled; (2) the facts of this case distinguish it from *Miller* v. *Burger;* (3) if the facts found by the Appeals Council in the instant case are insufficient to distinguish it from *Miller* v. *Burger,* then the cause should be remanded to the Administrator with directions to take additional testimony and make additional findings of fact on the issues which the court now holds to be material to the decision of this case.

THE LEGISLATIVE HISTORY OF SECTIONS 209 (l) (4) OF THE SOCIAL SECURITY ACT AND 1426 (h) OF THE INTERNAL REVENUE CODE

Under Title II of the Social Security Act of 1935, 49 Stat. 622–625, any individual who had attained 65 years of age and to whom wages [defined as "all remuneration for employment"] had been paid after December 31, 1936, and before he attained age 65, of not less than $2,000 was entitled to receive an old-age benefit from the date on which he attained age 65 until his death [Sections 202 and 210]. Title VIII, Section 801, 49 Stat. 636, imposed upon the income of every individual a tax equal to a certain percentage of the wages received by him with respect to "employment," and Section 804, 49 Stat. 637, imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the same percentage of the wages paid by him with respect to "employment."

Both Titles defined employment as "any service, of whatever nature, performed within the United States by an employee for an employer except [1]

'agricultural labor' " [Sections 210 (b), 49 Stat. 625, and 811 (b), 49 Stat. 639]. Neither Title defined the term "agricultural labor." But under Article 6 of the Social Security Board Regulations No. 2, Title 20 CFR 402.6 and Article 6 of Treasury Regulations 91, 26 CFR, Chapter I, §401.6, that term was narrowly defined. No services were included in the term "agricultural labor" unless either (a) performed on a farm in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding, or management of livestock, bees, or poultry, or (b) if not performed on a farm, unless the services consisted of processing, packing, packaging, transporting, or marketing of farm products, and then only if performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and only if such processing, etc., was performed as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

Similar regulations were adopted by many State agencies administering State unemployment compensation acts. Under these regulations, whether Federal and State taxes should be imposed upon identical operations depended upon the identity of the employer for whom they were performed rather than upon the nature of the work done. A grower was not required to pay Social Security taxes on the labor employed in packing his own fruit, although a growers' cooperative and a commercial packer were. *Batt* v. *United States,* 151 F. (2d) 949 (C. A. 9); *Latimer* v. *United States,* 52 F. Supp. 228, 235 (D. C., S. D. Cal.);

Fosgate v. *United States,* 125 F. (2d) 775 (C. A. 5); *Lake Region Packing Association* v. *United States,* 146 F. (2d) 157 (C. A. 5); *Florida Ind. Comm.* v. *Growers Equipment Co.,* 152 Fla. 595, 12 So. (2d) 889. A commercial handler of shade tobacco in Connecticut was required to pay employment taxes on its labor (*H. Days & Co.* v. *Tone,* 125 Conn. 300, 5 Atl. (2d) 23), although the same work performed for a grower off the farm was exempt from taxation. *American Sumatra Tobacco Corp.* v. *Tone,* 127 Conn. 132, 15 Atl. (2d) 80. A fruit grower in Washington handling his own fruit paid no taxes (*In Re Wenatchee Beebe Orchard Co.,* 16 Wash. (2d) 259, 133 P. (2d) 283), whereas a cooperative association of growers and a commercial handler whose help performed the same services were liable. *Cowiche Growers* v. *Bates,* 10 Wash. (2d) 585, 117 P. (2d) 624; *In Re Yakima Fruit Growers Association,* 20 Wash. (2d) 202, 146 P. (2d) 800.

The legislative history of the Social Security Act clearly indicates that the purpose of the change in the definition "agricultural labor" made by the Social Security Act Amendments of 1939 (53 Stat. 1360, et seq.) was to remove the inequities claimed to result from the operation of the "agricultural labor" exception in the original act.

At the hearings before the House Ways and Means Committee relative to the Social Security Act Amendments of 1939, it was strongly argued by representatives of the fruit and vegetable growers that the operations of washing, grading, storing, processing, packing, packaging, and delivering to storage or to market

or to a carrier for transportation to market of fruits and vegetables were an integral part of farming operations; that these operations were performed as an incident to the preparation of such fruit and vegetables for market; many of them were required by law to be performed before the fruits and vegetables could be marketed.

It was contended that the small farmers could not afford to build and equip the plant necessary to perform the various services necessary to prepare fruits and vegetables for market, such as washing, grading, and processing. Therefore they were often obliged to form cooperatives to perform such processing services for them, or to have the processing done for them by a commercial processor.

It was thought that if farmers' cooperatives and commercial handlers were subject to the tax imposed by the Social Security Act, measured by the wages which they paid for such services, while the large producers who could afford to build and equip their own packing plants and operate them by their own employees were exempted therefrom, the small growers would be unfairly discriminated against because the handlers, both cooperative and commercial, would shift the tax back to them by reducing, by the amount of the tax, the amount payable to the grower for his product.

As was said in the brief filed by the International Apple Association:

> We have shown that the whole process from the bud to the final washing, brushing, grading,

> and packing at the point of production is all part of one process before the grower can obtain value for his product * * *. To say that agricultural labor stops with the picking of fruit and leaving it in crates, boxes, or piles on the farm, unwashed, unsorted, or ungraded and not packed, unless the grower does those things himself on the actual farm, is to ignore facts, realities, and the essential steps that fruit growers have had to take in the evolution of production.
>
> We understand that the point has been made that the charge for washing, brushing, grading, and packing in a central packing house would not be borne by the producer. It absolutely is and would be borne by the producer and no one else. And if this tax has to be paid on the labor in a packing house, the grower will pay that. Not only that, but if the grower sells without performing these acts, then whoever stands in the grower's shoes discounts the price sufficiently to take care of these charges. (Hearings Relative to the Social Security Act Amendments of 1939 Before the Committee on Ways and Means, House of Representatives, 76th Cong., 1st Sess., Vol. 2, p. 1699).[4]

The "agricultural labor" exception was amended for the express purpose of removing such tax inequalities. As amended, the definition of "agricultural labor" is contained in Section 209 (l) *supra* of the Social Security Act and Section 1426 (h) of the Internal Revenue Code. Those sections define "agricultural

[4] Other testimony introduced at these hearings bearing on this question is printed in Appendix A, attached hereto.

labor" so as to include therein (1) the services enumerated in Article 6, Paragraph (a) of Social Security Regulations No. 2 (and the corresponding provisions of the Treasury Regulations), if performed *in the employ of any person;* (2) certain other services performed in the employ of the owner, tenant, or other operator of a farm in connection with its operation, management, etc., *if the major part of the services are performed on a farm;* (3) services performed in connection with the production or harvesting of certain other commodities *whether or not performed on a farm or in the employ of the owner or tenant of a farm;* (4) the services enumerated in the paragraph to be construed in the instant case, which provides as follows:

> In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

The Committee reports contain the following explanation of the provisions of Section 209 (l). (H.

Rep. No. 728, 76th Cong., 1st Sess., pp. 50, 52–53; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 61, 63–64):

> The present law exempts "agricultural labor" without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected.
>
> *Your committee believes that greater exactness should be given to the exception and that it should be broadened to include as "agricultural labor" certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.*
>
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>
> Paragraph (4) of the subsection extends the exemption to service (though not performed in the employ of the owner or tenant or other operator of a farm) performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity, provided such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of the paragraph, however, do not ex-

tend to services performed in connection with commercial canning or commercial freezing, nor to services performed in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. The expression "as an incident to ordinary farming operations" is, in general, intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. The expression also includes the delivery of such commodity to the place where, in the ordinary and natural course of the particular kind of farming operations involved, the commodity accumulates in storage for distribution into the usual channels of commerce and consumption. To the extent that such farmers, organizations, or groups engage in the handling, etc., of commodities other than those of their own production or that of their members, such handling, etc., is not regarded as being carried on "as an incident to ordinary farming operations." In such a case the rules set forth in subsection (c) of this section apply.

In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute "agricultural labor" even though not performed as an incident to ordinary farming

> *operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or storing of citrus* ["citrus" appears in House Report 728, at p. 53 but not in Senate Report 734 at p. 64] *fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.* [Italics supplied.]

In the course of the debate on the bill in the House, Congressman Buck, a member of the Ways and Means Committee, and the sponsor of this amendment, explained Section 209 (1) as follows:

> These paragraphs are based on the theory that what is agricultural labor is determined by *the nature of the work and not by whom the man is employed.* Agricultural labor starts with the planting of a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be regarded as in the nature of agricultural labor.
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> * * * I stated a few minutes ago that I am a farmer. I have a fairly large acreage, and on it I have a packing plant where I can clean, wash, and pack my own fruit.
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> That labor is exempt. If 10 or 20 of my neighbors do the same thing in the same way, if they get together and build a cooperative

packing shed on the railroad and wash their apples or their pears, and pack their fruit and use the same type of labor under the same circumstances, they are now taxed under the rulings of the Bureau of Internal Revenue, because the work is done off of a farm. Where is the justice in that, in making the small producer suffer?

* * * * *

Let me add that the Pure Food and Drugs Act of the United States and many State laws require rigid inspection of agricultural commodities, and in the case of apples and pears require that they be washed before they can be shipped in interstate commerce. The average farmer is in no position to handle this work by himself on his farm. He must cooperate with his neighbors in a common packing plant where his fruit can be washed, his beans graded and cleaned, and so on. All these processes are a part of the preparation of the farm crop for market, and it has been unfair and inequitable for the Bureau of Internal Revenue to make rulings which tend to restrict all of these operations to a given farm. Their rulings have worked to the advantage of those who have large acreages *on which they can carry through a complete agricultural operation from producing a crop to delivering for transportation to market.* It might be very fairly said the present amendment is intended not merely to state clearly what Congress considers are agricultural operations but to remove the inequities that now exist.

* * * * *

* * * in the opinion of those of us who helped to draw this amendment these various services *which form an integral part of agriculture* were intended to be covered by Congress in its original enactment; * * *.

* * * * *

Let me call attention to another serious anomaly. If you are the owner of a farm, and you enter into a written agreement with a marketing agent to pick and pack your crop, whether it is fruit or beans or anything else, the labor employed by the marketing agent is considered to be agricultural labor at the present time; but if you sell your fruit or beans to that same marketing agent and he comes in with a crew and packs your crop, that is not agricultural labor under the rulings of the Bureau of Internal Revenue. Services performed by the employees of a company handling tobacco in warehouses off the farm but in the immediate neighborhood where the process of fermentation was carried on, however, have been held to be agricultural, so that the Treasury has applied no uniform rule in connection with its idea of limiting agricultural labor to work on the farm. In the case of cotton ginning, packing lettuce, and so forth, however, a very rigid restriction has been made limiting the exemption to work done on a farm itself.

* * * * *

These curious distinctions produce inequities among people operating in the same commodities in the same localities, and certainly this is an injustice. 84 Cong. Rec. 6864–6865, June 8, 1939. [Italics supplied.]

It is thus clear that under the paragraph to be construed in this case all services performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of fruits and vegetables are "agricultural labor" even though they are not performed on a farm or in the employ of a farmer or as an incident to ordinary farming operations, if performed as an incident to the preparation of such fruits or vegetables for market and before delivery to a terminal market for distribution for consumption. By way of contrast, it should be noted that while with respect to agricultural commodities other than fruits and vegetables such services do not constitute "agricultural labor" unless performed by an employee of a farmer, farmers' organization, or group services performed as an incident to the preparation of fruits or vegetables for market are "agricultural labor" though performed by commercial handlers, since such services need not be performed as an incident to ordinary farming operations.

It is clear also that in the expression "as an incident to the preparation of such fruits or vegetables for market" preparation for market was intended by Congress to mean preparation of fruits and vegetables in their raw or natural state for sale to consumers who buy them for domestic or industrial uses and that the expression includes all services necessary to put fruits and vegetables into that condition no matter by whom the services are performed. The term "terminal market" was intended to designate the

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place of business to which such products are shipped, prepared for sale to consumers, and from which they enter into the usual channels of distribution for consumption. Until they are delivered to such a place of business in that prepared condition, all of the enumerated services performed in handling fruits and vegetables are "agricultural labor."

ARGUMENT

Miller *v.* Burger Should Be Overruled

In the instant case Albert Miller and Company, a commercial processor, was engaged in washing, sorting, grading, and packaging potatoes which it bought of the growers in its vicinity.

As shown above, the committee reports on Section 209 (l) (4) expressly declare that the services performed in the sorting, grading, or storing of fruits or in the cleaning of beans as an incident to the preparation for market are "agricultural labor," even though performed in the employ of a commercial handler of such commodities.

We can perceive no distinction between the washing, sorting, and grading of potatoes and the sorting, grading, or storing of fruits or the cleaning of beans. We believe, therefore, by this analogy that the court below should have held that the services performed by appellee were "agricultural labor." But it held on the authority of *Miller* v. *Burger,* 161 F. (2d) 992 (C. A. 9), that they were not "agricultural labor." We believe that the decision in the *Burger* case was not well considered and that this court should now re-

consider and overrule it and reverse the decision of the District Court in the instant case.

The court below overruled the decision of the Appeals Council in the instant case on the authority of this court's decision in *Miller* v. *Burger,* 161 F. (2d) 992 (C. A. 9), which affirmed the decision of the District Court for the Southern District of California, Northern District, reported under the name of *Burger, et ux.* v. *Social Security Board,* 66 F. Supp. 619 (S. D. Cal.).

In the *Burger et ux.* case, *supra,* the District Court had held that the operations of grading, cleaning, washing, sulphuring, fumigating, and packaging dried fruit, when performed by a commercial packer for his own account after he had bought the fruit from the growers, were not services rendered as an incident to the preparation of such fruit for market. It recognized that, under the identity of the employer test applied under the Social Security Act of 1935 by the Social Security Board and the Bureau of Internal Revenue, those growers with sufficient production to support their own processing or packing plants could market their products tax-free, while identical products of the smaller grower, processed and distributed collectively through grower-owner cooperatives or independently through commercial packers, were compelled to compete for market carrying the burden of the tax. It recognized also that the present definition of "agricultural labor" in Section 209 (l) of the Social Security Act and Section 1426 (h) of the Internal Revenue Code, as amended in 1939, was adopted to eliminate the tax discrimination resulting from the definition of "agricultural labor" in the

regulations promulgated under the Social Security Act of 1935 and that the above sections were amended for the purpose of broadening the definition of "agricultural labor" contained in those regulations.

But it held that the exemption from employment taxes of agricultural commodities, whether produced by a large grower, by a member of a cooperative, or by a small nonmember continued only

> "* * * up to the point where the commodity in the ordinary course of trade normally passes out of the hands of the producer or grower, and from that point forth must bear alike the burden of such taxes. When this purpose is given full effect, it seems equally clear that the 'market' Congress meant is the 'growers' market'—the place or point where and the time when the ordinary producer or grower of the commodity customarily parts with economic interest in its future form or destiny.
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> * * * * *
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> "All properly cognizable indicia point to a construction of the legislative definition which will operate to exempt as 'agricultural labor' *all service performed for the account of the producer or grower in connection with* (1) the production or raising and harvesting of any agricultural or horticultural commodity and (2) *preparation of the commodity for and delivery to a producers' or growers' market in the form or condition in which such commodity is customarily sold or disposed of by the ordinary producer or grower thereof,* regardless of whether such exempted service be performed by an employee of the producer or grower, or by

> an employee of a cooperative of which the producer or grower is a member, or by an employee of a commercial handler rendering such service for the account of the producer or grower. [Italics supplied.]
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> * * * * *
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> "* * * The services of employees like Burger are performed not for the account of any grower, but for the sole account of a commercial handler engaged in the middleman business of placing the dried fruit in channels of 'distribution for consumption'."

This court, in affirming that decision, said (p. 993) that since it was in substantial accord with the legal conclusions reached by the District Court, it would serve no useful purpose to enter upon an extensive discussion of the law of the case, and indicated its agreement with the District Court's construction of the statute. It is respectfully submitted that that decision should be reconsidered.

The court's fundamental error was due to its assumption that under the statute there was a point along the producer-to-consumer route of a given commodity prior to delivery to a terminal market at which processing services ceased to be "agricultural labor" and that Congress had not designated "which, or more accurately, whose market was meant by that word" (66 F. Supp. 626).

We do not believe that Congress intended to designate any such point. The word "market" in the expression "preparation of such fruits or vegetables for market" was used synonymously with "sale"; that it is descriptive of a condition of the fruits and

vegetables and not of the place at which such commodities are sold or of the individuals to whom they are sold. "Preparation * * * for market" means "preparation for sale," without reference to the place where the sale is to be made. It comprises the various operations which the commodity, by law or custom, is required to undergo before it can be offered for sale.

That such use of the expression "preparation for market" is a common one is clear. Webster's International Dictionary, second edition, 1941, defines the word "process" as "to subject to some special process or treatment * * * to subject [esp. raw material] to a process of manufacture, development, preparation for the market, etc., to convert into marketable form." This definition is quoted in *Kennedy* v. *State Board of Assessment and Review,* 224 Iowa 405, 276 N. W. 205, 206 (Iowa); *France Company* v. *Evatt,* 143 Ohio State 455, 55 N. E. (2d) 652, 653; *Huron Fish Company* v. *Glander,* 146 Ohio State 631, 67 N. E. (2d) 546; *Morris* v. *Burrows,* 180 S. W. 1108, 1113 (Texas Civil Appeals); *Colbert Mill and Feed Company* v. *Oklahoma Tax Commission,* 188 Okla. 366, 109 P. (2d) 504; where the court, after quoting the above definition, said (p. 506):

> The quoted definition of the word "process" shows that it is synonymous with the expression "preparation for market" which in turn has the same meaning as the expression "preparing for sale" used in the statute under consideration.

In *Claim of Lazarus,* 268 A. D. 547, 52 N. Y. S. (2d) 682, affirmed sub nom. *In re Lazarus,* 294 N. Y. 613, 64 N. E. (2d) 169, a case involving the construction of the expression "preparation for market" in a section of the New York Unemployment Insurance Law identical with Section 209 (l) (4) of the Social Security Act, the court said:

> The phrase "preparation for market" means the act of transforming the product from its raw and natural state into the prescribed, packaged form so that it may be saleable to the wholesaler, retailer, and consumer.

Only if "preparation for market" is construed as being synonymous with "preparation for sale" can effect be given to all the language of the statute without reading into it words which cannot, by fair intendment, be found there, and only so can it be administered without making the subtle, not to say whimsical, distinctions which Congress wished to avoid.

On its face Section 209 (l) (4) makes no distinction between the services of drying, packaging, processing, etc. of fruits and vegetables performed on or off a farm, in the employ of or for the account of a grower or of an individual other than a grower.

The language as well as the legislative history of Section 209 (l) (4) shows clearly that Congress intended to provide that all services performed in handling fruits and vegetables which are necessary to put them into the condition in which they can be sold to consumers are "agricultural labor" even though not performed on a farm, or in the employ of a farmer

and even though not performed as an incident to ordinary farming operations.

As will be shown hereafter, the last sentence of Section 209 (l) (4) means merely that after an agricultural commodity has been prepared for sale to consumers, and has been delivered to a market where it is offered for sale to consumers, no further services performed in handling, drying, packing, packaging, processing, freezing, grading, or storing shall be excepted from employment as "agricultural labor."

It is to be noted that throughout its opinion the District Court in *Burger et ux.* v. *Social Security Board et al.,* 66 F. Supp. 619, ignores the distinction made by the statute and the Committee Reports between fruits and vegetables and all other agricultural commodities. Not only in those parts of the opinion quoted above (pp. 32, 33, *supra*), but throughout, the court speaks only of "commodities" as if the statute made no distinction between services performed as an incident to ordinary farming operations and services performed as an incident to the preparation of fruits and vegetables for market. If Congress did not intend to differentiate between them, it is difficult to account for the difference in the language used in regard to them.

Evidently its failure to note the distinction led the court to misconstrue the expression "preparation for market." It is true that in the case of agricultural products other than fruits and vegetables the services must be performed as an incident to ordinary farming operations. It could, therefore, be argued that in this respect the statute was intended to continue in effect the regulations promulgated under the Social

Security Act of 1935 and that the services must be performed by or for the account of the grower.

But it is clear from the language of the statute itself as well as from the Committee Reports that, since services performed in the handling etc., of fruits and vegetables need not be performed "as an incident to ordinary farming operations," the statute does not distinguish between such services performed by or for the account of a grower and similar services performed by or for the account of a middleman.

Any possible obscurity in the language of the statute is clarified by the House and Senate Committee Reports, *supra*. These state that the services are "agricultural labor"

> even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph for example, services performed in the sorting, grading or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

Congress accepted the thesis, at least as to fruits and vegetables, that "the whole process from the bud to the final washing, brushing, grading, and packaging at the point of production is all part of one process before the grower can obtain value for his product" and that until that process is completed and the fruits and vegetables have been delivered to

market or to a carrier for transportation to market prepared for sale to consumers, all services performed in handling them are "agricultural labor." All such services are referred to by Congressman Buck "as an integral part of agriculture intended to be excepted from 'employment'" (*supra,* pp. 26 and 28).

Congress intended that thenceforth the test of "agricultural labor" should be, not the identity of the individual for whom or for whose account the services were performed, but the nature of the services. The court's construction makes the identity of the individual *for whose account* the services are performed the test instead of the identity of the individual *in whose employ* the services are performed; i. e., the farmer in whose behalf the processing was performed.

To read into the statute a provision that services performed by cooperatives or commercial handlers in the handling of fruits and vegetables as an incident to their preparation for market are "agricultural labor" only when performed for the account of the grower defeats, in part at least, the purpose of the amendment to remove the tax inequities which have "resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones." [See Committee Reports quoted at p. 24, *supra.*]

For, while taxes are never imposed with respect to services performed in the handling of fruits and vegetables produced by large operators, services performed in the handling of fruits and vegetables produced by small farmers would be taxed if performed by middlemen for their own account, after the grow-

ers had parted with their economic interest in the fruits and vegetables. As will be pointed out more fully below, this necessitates the drawing of subtle distinctions based on facts difficult to ascertain. Such distinctions have been characterized by Congressman Buck as "curious distinctions" which "produce inequities among people operating in the same commodities in the same localities" [*supra,* p. 28].

As pointed out at the hearings, if such services are taxed, the taxes will be borne by the grower whether or not the services are performed for his account. The price which the processor pays for fruits and vegetables is determined roughly by the price fixed in the central wholesale markets in large cities less the cost of transportation thereto and the processing costs he incurs. If to those costs is added the amount of the excise tax, with respect to having individuals in his employ, exacted under the Internal Revenue Code, the price he pays the grower will be diminished by the same amount. At least Congress so believed. The statement in the committee reports [*supra,* p. 24] that "in the case of many of such services it has been found that the incidence of the taxes falls exclusively upon the farmer" constitutes a legislative finding to that effect, which must be respected by this court since it obviously has a reasonable basis.

The committee reports state that greater exactness should be given to the "agricultural labor" exception than is given by the regulations issued under the Social Security Act of 1935. Congress obviously intended to adopt a test of what is "agricultural labor" which would be more exact and easier to apply than that

provided for in the regulations. As construed by the court, Sections 209 (l) (4) of the Social Security Act and 1426 (h) (4) of the Internal Revenue Code can hardly be said to meet these specifications.

The distinction drawn by the court between agricultural and nonagricultural labor is not based solely on whether the services are performed for the account of the grower or for the account of a commercial handler or other middleman, but on whether or not the services performed for the account of the grower are services performed in connection with the "preparation of the commodity for and delivery to a producer's or grower's market in the form or condition in which such commodity is customarily sold or disposed of by the ordinary producer or grower thereof." The growers' market is defined as the "place or point where and the time when the ordinary producer or grower of the commodity customarily parts with economic interest in its future form or destiny."

Whether the court means that the growers' market is the place or point where the grower parts with legal title to his product though he retains an equitable title or other interest therein is not clear. Assuming, the the court did in *Baiocchi* v. *Ewing,* 87 F. Supp. 520 (N. D. Cal.),[5] decided by the United

[5] In that case the court held the services performed by a nonprofit agricultural cooperative in grading, processing, and picking dried fruit produced by its members after it had acquired legal title thereto were nonagricultural labor although under its bylaws it was not permitted to retain any profits and each member had an equal proprietary right in its property and assets. It was not disputed that the cooperative performed such services for its

States District Court for the Northern District of California, Southern Division, on December 8, 1949, that it means the point at which he parts with his legal title, it is by no means clear how that point can be determined by the agencies administering the Social Security Act and the Internal Revenue Code.

Section 18 of the Uniform Sales Act, which has been adopted in 37 states including Idaho and California, provides that "where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." Section 19 lays down some rules for ascertaining the intention of the parties which, however, are applicable only where a different intention does not appear. What is the intention of the parties to a contract of sale, when it is not expressed, is always a difficult question to decide, even for a court which has the parties before it. Facts must frequently be found from conflicting evidence, and, even if the facts are undisputed, opinions will often differ as to the inferences to be drawn from them. Administrative agencies such

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members exclusively and that the entire net proceeds of the fruit which it processed and sold were distributed to its members and the conclusion seemed inescapable that the tax would be borne by its grower members. The contention that the cooperative acted merely as agent or trustee for the members who retained an equitable title to the fruit until sold by the cooperative was passed over.

as the Bureau of Old-Age and Survivors Insurance and the Bureau of Internal Revenue would obviously encounter great difficulties in obtaining the evidence necessary to decide such questions with neither of the parties to the contract before them, and the expense to the agencies as well as to the parties to the contract, of obtaining the evidence on which their decisions must be based might prove to be burdensome.

Moreover such a test would be impracticable because the distinction between agricultural and non-agricultural labor would be made to depend on the form of the contract between grower and processor rather than on the substance of the transaction; on whether, under the contract the purchase price to be paid by the processor was stated to be the price of unprocessed fruit or the market price of processed fruit less the cost of processing, although in either case the price realized by the grower would be the same, and whether or not passage of title was delayed until after the processive services had been completed. In any case payment of the tax could easily be evaded merely by providing in the contract that title to the commodity should not pass until after the services had been performed. Congressman Buck's explanation of this section in the House shows that the incidence of the tax was not intended to depend on the form of the contract.

But the administrative agency's difficulties do not end when it has been determined that in a particular case the services were performed before or after the

grower had parted with title to the commodity. The preparation of fruits and vegetables for market frequently consists of several operations, some performed by the grower, some by the processor; but all of them must be performed before they can be sold to the consumer and, viewed realistically, constitute separate steps in the process of preparation for market. Under the statute as construed by the court whether any of these operations is "agricultural labor" depends on whether it is *customarily* performed by or for the account of the ordinary grower.

For instance, in *Burger, et ux,* v. *Social Security Board et al.,* 66 F. Supp. 619, 621, it appeared that the grower sliced the fruits, removed the pits, placed the halves on drying trays which were set in the sun, sulphured the peaches, apricots, and nectarines, packed them into sweat boxes or sacks, and delivered them to Rosenberg Brothers, who cleaned, graded, and washed them, sulphured such fruit as had not been sulphured by the grower, and fumigated and packaged it. If it had appeared in that case that Rosenberg Brothers always bought nectarines before they were sulphured but that the ordinary grower customarily sulphured them, the court would presumably have held that the sulphuring operations were "agricultural labor," even though performed by a commercial processor for his own account.

Conversely, were it to appear that the ordinary grower did not customarily sulphur nectarines, the court would have to hold, if the question arose, that the grower who did sulphur them performed non-agricultural labor. It becomes important, therefore,

to decide how it can be determined what the ordinary grower customarily does and who he is. Did the court mean the majority of growers in the district or producing area adjacent to the plant at which their fruits or vegetables are processed, a rather indefinite concept, or in the state, or in the whole country?

If it meant the ordinary producer in the producing area or in the state, it would follow that processing services performed in one part of the country may be subject to the tax, although they are exempt in the rest of the country, merely because the ordinary grower customarily parts with his economic interest in his product in a particular area at a different time than in the remainder of the country. We believe that the intention to provide that what is "agricultural labor" depends on the custom of handling an agricultural commodity prevalent in the vicinity of the processor should not be attributed to Congress without clear evidence of such an intent. If the whole country is meant, then the question whether a particular processing service is nonagricultural labor subject to the tax requires a determination at what point the ordinary grower throughout the entire country customarily parts with his economic interest in his product. These are not matters of common knowledge of which administrative agencies, or even the courts, can take judicial notice. The difficulty of deciding such questions would be much greater than the difficulty of deciding at what point title passes from a single seller to a single buyer.

It is unreasonable, in view of the language and legislative history of this section, to attribute to

Congress an intent to adopt a test of "agricultural labor" so difficult to interpret and administer.

In the *Burger et ux.* case, *supra,* the court decided, also, that the packing plant of Rosenberg Brothers, where the wage earner's services were performed, was a "terminal market" within the meaning of the statute. The District Court said [p. 624–625]:

> Thus Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commodities in passing from producer to consumer, and has declared that once the commodity reaches the market, from which in ordinary course of trade it next goes into the channels of distribution for consumption, any service afterwards performed for any person in treating or handling such commodity does not constitute "agricultural labor" within the meaning of the Act.
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> The uncontradicted evidence presented to the Board discloses that along the producer-to-consumer route of dried fruit the Fresno packing plant of Rosenberg Brothers is a terminal market. The Company purchases from growers fruit which has been pitted and dried. This fruit is stored and as orders require, the Company packs, sells, and delivers it to wholesale and retail outlets. Burger's services were the beginning step in the Rosenberg process of preparing dried fruit for "distribution for consumption."

The Court of Appeals said that it agreed with the District Court that the Rosenberg Brothers' plant was a "terminal market" for the farmer-producers who sold and delivered their dried fruit to that con-

cern; that it was only after the farmer-producer had sold and delivered his fruit to Rosenberg Brothers and, hence, after all "agricultural labor" in connection therewith had ceased, that the services in question were performed.

If this court's construction of Section 209 (l) (4) were correct, it would be clear that any plant which sorted, graded, processed, packaged, and marketed fruits and vegetables which it had bought from the grower would be a "grower's market" because it bought the fruits and vegetables as well as a "terminal market" because it sold them.

Clearly, either the provision of the first sentence of Section 209 (l) (4) that handling services are "agricultural labor" only if performed "as an incident to the preparation of such fruits and vegetables for market" or the provision of the second sentence that such services are not "agricultural labor" if performed "in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption" would be surplusage. Such a construction should not be favored. This section should be construed so as to give effect to all of its language.

If, as we believe we have shown conclusively, services performed by a farmers' cooperative or commercial handler as an incident to the preparation of fruits and vegetables for market are "agricultural labor," whether or not performed for the account of the grower, it follows necessarily that the plant of such a processor is not a terminal market. For the processor is not a con-

sumer of fruits and vegetables. The only use he can make of them after he has processed them is to sell them to wholesalers or consumers. The purpose of Congress to equalize the tax burden of the small and large growers would be defeated by holding that his plant is a "terminal market" within the meaning of the last sentence of Section 209 (l) (4) just as much as by holding that he is the "market" within the meaning of the first sentence; for the processor would, in either case, be subject to the tax and would shift its burden to the grower.

The only construction which is consistent with the Congressional intent is that a terminal market is the one to which fruits and vegetables are delivered after they have been prepared for market; i. e., after they are in the condition in which they can be sold to consumers. The only services excluded from "agricultural labor by the second sentence of Section 209 (l) (4) are the additional services performed in the handling, sorting, grading, processing, etc., of fruits and vegetables after the services necessary to prepare them for sale to consumers have been performed.

In *Claim of Lazarus, supra,* the statute was so construed. This case involved the question whether services performed by commercial processors in cleaning beans were "agricultural labor" within the meaning of a section of the State Unemployment Insurance Law identical with Section 209 (l) (4). The beans with reference to which the processor's services were performed were transported to bean elevators, from the farms on which they were grown, by truck. Upon delivery to the elevators, scale tickets were is-

sued bearing the name of the farmer, who was paid the market price for hand-picked beans per pound less the cost of picking them. The result of the picking operations was to clean the beans into the condition required by the regulations of the Department of Agriculture before they could be sold to consumers. After cleaning the beans the processor sold them to canners and jobbers. In holding that the bean elevator was not a terminal market the court said:

> The elevator is not a terminal market in the proper sense of the term. A terminal market is the place of business to which products are shipped in a sorted, graded, packaged condition, ready for immediate sale. If the product in the course of shipment reaches a warehouse in its raw or natural state, or partially sorted, but not yet fully processed and approved for public sale according to law, it is not yet prepared and ready for market; the intermediary warehouse, like the elevator is not the "terminal" delivery point for such products. After the product has been further completely processed it is deemed prepared "for market" and then and then only is ready "for distribution for consumption."

The Court of Appeals agreed with the Appellate Division that the bean elevator was not the growers' market and affirmed its decision that the services were not "agricultural labor" without discussing the question whether it was a "terminal market."

We believe that the construction of "terminal market" adopted by the New York courts is the correct one and should be adopted by this court.

The main reasons given by the District Court in the *Burger et ux.* case, *supra,* in support of its construction of Section 209 (l) (4) were:

(1) That the principal reason for excepting "agricultural labor" from the benefit and taxing provisions of the Social Security Act of 1935 were "administrative difficulties and accounting inconveniences in farm work."

It is true that the Supreme Court in *Carmichael* v. *Southern Coal Company,* 301 U. S. 495, 513, said that:

> Relatively great expense and inconvenience of collection may justify the exemption from taxation of * * * farmers, * * * not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax.

It is true, also, that the exemption from the tax of processing plants which would not experience the like difficulty as farmers in maintaining employment records is not justified on that ground. But the committee reports on the Social Security Act Amendments of 1939 show clearly that the reason for the adoption of Section 209 (l) (4), broadening the definition of "agricultural labor" was to equalize the tax burden of the large and small farm operators. The amendment should be construed in the light of its purpose and the mischief at which it was aimed. It has been shown that this purpose would be defeated by the construction put upon the section in the *Burger* case. The reasoning justifying a narrow construction of "agricultural labor" under the Social Security Act

of 1935 cannot justify a narrow construction of the amended definition.

(2) A second reason given by the court was that the Social Security Act should be liberally construed and, therefore, all doubts of interpretation should be resolved in favor of coverage. It is true as a general rule that social legislation, such as the Social Security Act, should be liberally construed so as to accomplish its purpose. But the canon of liberal construction is merely an auxiliary aid to discovering the intention of Congress in doubtful cases and not to thwart it. It cannot be used to justify a construction contrary to the clearly expressed legislative intent. In *Better Business Bureau* v. *United States,* 326 U. S. 279, 283, in commenting on the taxpayer's argument that exemptions under the Social Security tax provisions should be given a liberal construction, the Supreme Court said:

> Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations of such an exemption are to be ignored.

For the same reason statutory words and phrases in a provision granting exemption from a tax should not be given unusual or tortured meanings unjustified by the legislative intent. In the instant case Congress had to choose between the conflicting interests of small farmers in a broad exemption from the tax and the interests of employees of processing plants in eligibility for benefits; i. e., a narrow construction of the

tax exemption and a "liberal" construction on the Social Security Act. Since Congress plainly showed that it intended to choose the former, there is no room for the application of the canon of liberal construction.

(3) The final reason given by the court for its construction in *Burger et ux., supra* (66 F. Supp. 619, 627), was that to exempt packing house activities in processing, for the sole account of the processor, fruit grown by others and sold to it as a commercial packer, would work an exemption of doubtful validity.

We do not believe that the court's construction can be justified on this ground. As has been shown, farmers' cooperatives and commercial handlers were exempted from the tax under the circumstances detailed in Section 209 (1) (4) because of the conviction of Congress that the tax would be borne, not by them, but by the small growers from whom they bought the fruits and vegetables which they processed. The exemption of the processors was merely the means of attaining a legitimate end; namely, that of equalizing the tax burden of small and large growers. Legislation granting farmers and farmers' cooperatives special, favored treatment has frequently been sustained by the United States Supreme Court. See, for example, *American Sugar Refining Company* v. *Louisiana,* 179 U. S. 89, in which the court held that a statute which required the payment of a licence tax by refiners of sugar, but excepted planters and farmers grinding and refining their own sugar, was held not violative of the fourteenth amendment.

In *German Alliance Insurance Company* v. *Lewis,* 233 U. S. 389, a law which placed burdensome regu-

lations upon all insurance companies except farmers mutual insurance companies which insured farm property was sustained. In *Smith* v. *Kansas City Trust Company,* 255 U. S. 180, the court sustained the Federal Farm Loan Act, which consisted entirely of special legislation for farmers.

The exemption of farmers from the operation of workmen's compensation acts (*New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Ward & Gow* v. *Krinsky,* 259 U. S. 503) and of women employed in harvesting, curing, canning, or drying of perishable fruits and vegetables from the Women's Eight-Hour Law of California (*Miller* v. *Wilson,* 236 U. S. 373) were sustained.

Nor is the Social Security Act unconstitutional because it provides that benefits thereunder are payable only to employees of individuals engaged in covered employment, who are subject to the taxes imposed by the Federal Insurance Contribution Act. That question is settled by *Miller* v. *Wilson, supra,* and *Steward Machine Company* v. *Davis,* 301 U. S. 548.

The exemptions from the tax of farmers' cooperatives and commercial processors is merely a means to and incidental to the accomplishment of a legitimate purpose. The constitutionality of the exemption is not open to doubt.

II

The instant case is distinguishable from Miller *v.* Burger

In the instant case the referee found from the undisputed evidence that the washing and grading of potatoes was necessary to prepare them for distribution to the consumer. These were the services per-

formed by the plaintiff for Albert Miller and Company. Of similar services the committee reports state:

> Under this portion of the paragraph, for example [referring to the first sentence of Section 209 (1) (4)], services performed in the sorting, grading, or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

No distinction can be perceived between the sorting and grading of fruits on the one hand and the washing and grading of potatoes on the other. The language of the committee reports, above quoted, shows clearly that Congress intended, by Section 209 (1) (4) to provide that such services as sorting, washing, and grading of potatoes were "agricultural labor," no matter by whom or for whose account they were performed. Clearly such washing and grading were incident to the preparation of the potatoes for market. Therefore, the services performed by the plaintiff for Albert Miller and Company were "agricultural labor."

Furthermore, it was not disputed in the *Burger* case, that at the time the growers delivered their dried fruit to Rosenberg Brothers they received the purchase price payable therefor and parted with all their economic interest therein.[6] In the instant case the growers had not parted with all their economic interest in the potatoes at the time they were washed,

[6] Rosenberg Brothers was a well-known industry leader which cannot properly be compared with a carlot potato distributor such as appellee.

sorted, and graded by Albert Miller and Company. By the terms of the agreement between the company and the grower the potatoes were to be paid for on the basis of the quantity of the U. S. No. 1 and U. S. No. 2 potatoes in the lot. Since there was a recognized price differential between U. S. No. 1 and U. S. No. 2 potatoes, it was essential to determine by sorting and grading, the amount of each grade in the entire lot purchased by the company in order to determine the price to be paid to the grower. The fact that the price payable to the growers could not be determined until after the services of sorting and grading had been performed shows that the growers retained an economic interest in the potatoes until they had been sorted and graded.

The nature of the transaction was such as to show that the parties contemplated and that the transaction required the performance of services such as those performed by the plaintiff for Albert Miller and Company. The grower, in effect, sold the potatoes to the company, not in the condition in which they were at the time the company took or had the right to take possession, but in the condition contemplated after sorting and grading. Under these circumstances Albert Miller and Company acted as the agent of the growers in washing, sorting, and grading the potatoes and title thereto did not pass to it until such services had been performed. Section 18 of the Uniform Sales Act, adopted by the State of Idaho in 1919, provides that:

> (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the

> parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

Rule 2 of the rules provided by Section 19 for ascertaining the intention of the parties is as follows:

> Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. (See also 2 Williston on Sales [Revised Edition 1948] Section 263, p. 12.)

The same principle is well stated in 46 Am. Juris.—Sales—Section 422, as follows:

> In the absence of any evidence of a contrary intention, the general rule is that a sale of personal property is *not* completed while anything remains to be done to determine its quantity and thus its price, as by weighing, measuring, or counting, unless this is to be done by the buyer alone. The reason for this is because ordinarily in such transactions it is the intention of the parties that the title and corresponding risk remain in the seller, until the price is definitely ascertained. * * *

In the absence of any intention expressed by the parties, the law raises a presumption that if something remains to be done for the purpose of testing the property or fixing the amount to be paid by weighing, measuring, or the like, or of putting the property into condition for final delivery, the title

does *not* pass until the act is done. *Wadhams* v. *Balfour,* 32 Ore. 313, 51 Pac. 642; *Star Brewery Co.* v. *Horst,* 120 Fed. 246 (C. A. 7); *Meachem on Sales,* Sec. 478. When the identification of the goods consists in the segregation, weighing, or measuring, title does *not* pass prior thereto. *Blackwood* v. *Cutting Packing Co.,* 76 Cal. 212, 18 Pac. 248. Where the seller has things to do to put the goods sold into deliverable shape, performance of such things by him (herein by the plantiff, acting for the seller) is usually a condition precedent to the passing of title. *Wanee* v. *Thomas,* 75 Cal. App. 231, 242 Pac. 509; *Pfoh* v. *Porter,* 23 Cal. App. 59, 137 Pac. 44; *Mac Rae* v. *Heath,* 60 Cal. App. 64, 212 Pac. 228; *Walti* v. *Gaba,* 160 Cal. 324, 116 Pac. 963; *Blackwood* v. *Cutting Packing Co., supra.* To the same effect, see *Idaho Products Co.* v. *Bales,* 36 Idaho 800, 214 Pac. 206 (1923); *Wanee* v. *Thomas, supra.*

In the instant case the potatoes were not in a marketable state until they had been sorted and graded. In performing these services, Albert Miller and Company acted as agent for the growers. Therefore, title thereto did not pass to the company until the services had been performed.

The instant case is distinguishable from the *Burger et ux.* case, *supra,* on the further ground that here the potatoes at the time they came into the possession of Albert Miller and Company were, unlike the dried fruit in the *Burger* case, in their natural, unmanufactured state and the services performed in handling them were an integral part of farming operations.

In the *Burger et ux.* case it appeared from the facts as stated by the court (p. 621) that the dried fruit handled by Rosenberg Brothers was not at the time of its delivery to the company in its natural, unmanufactured state. The facts were there stated as follows:

> After growing the fruit and harvesting it, the typical farmer hauls it to his cutting shed where his cutters slice the fruit, remove the pits, and then place the halves on drying trays which are then set in the sun. In the case of peaches, apricots, and nectarines the grower-dryer also sulphurs them. The dried fruit is then packed into sweat boxes or sacks and is delivered and sold to the packing company. Apparently, prior to the establishment of modern methods of merchandising, the dried fruit was marketed by the grower to the consumer in substantially the same state of preparation in which it is now, when delivered and sold to the packing company.

The packing company's function was "to receive that fruit, grade it, clean it, wash it, sulphur it, fumigate it, and package it" and sell it. The processing and packaging was done "for appearance sake and for keeping qualities." The court considered that such services were not services incidental to the preparation of the fruit for market and were not an integral part of farming activities.

In the instant case the grower did not handle the potatoes at all after they were harvested and placed in his cellar. They were delivered to Albert Miller and Company in their raw or natural state. As

specifically found by the referee, they were not ready for distribution to the consuming public prior to their washing, sorting, and grading. Washing, sorting, and grading of fresh fruits and vegetables in their natural, unmanufactured state are services generally performed as field activities on the farm in connection with and immediately following and closely related to growing and harvesting. They are farm activities and constitute an integral part of farming operations. The services performed by Rosenberg Brothers in the *Burger et ux.* case were in the nature of nonagricultural merchandizing operations, performed after the dried fruit had lost its original form and natural state and had been prepared for market, and were not an integral part of farming activities.

In the instant case the potatoes could not be sold to consumers until they had been washed, sorted, and graded. The services performed by the plaintiff for Albert Miller and Company of washing and grading potatoes were entirely different from the services performed by the plaintiff in the *Burger* case for Rosenberg Brothers. The *Burger* case did not involve the question whether services similar to those performed by the plaintiff in the instant case were services performed as an incident to their preparation for market.

We believe also that Albert Miller and Company's warehouse at Burley, Idaho, was not a terminal market, even under the statute as construed in the *Burger* case. Unlike Rosenberg Brothers it was not engaged in the business of distributing the potatoes

for consumption. Its principal business was that of washing, grading, and storing potatoes in bulk. Its marketing operations were relatively minor and incidental thereto. Of the potatoes handled by it about sixty percent were sold, not by the warehouse, but at its Chicago office and were shipped pursuant to directions from it. Had they been shipped first to the company's principal place of business in Chicago and from there to its customers, it could not be said that the warehouse was the place where the potatoes accumulated in storage "for distribution into the usual channels of commerce and consumption." The fact that they were shipped directly from the warehouse to the company's customers is immaterial.

The remaining forty percent of the potatoes were sorted and graded in the growers' cellars and were sold to local produce companies, local interstate and intrastate transportation companies, restaurants, stores, and private individuals *without ever entering the warehouse.* As to them the warehouse was clearly not the place where they accumulated in storage "for distribution into the usual channels of commerce and consumption."

As the Appeals Council, in deciding this case, correctly said:

> * * * In our opinion, the operations of the Burley warehouse must be considered as a whole and the fact that sixty percent of the potatoes bought through that warehouse were sold to wholesalers and dealers located at points far distant supports the conclusion

that such points, rather than the Burley warehouse, constituted the "terminal market" for its output, within the meaning of the Act. If it is considered proper to consider the local sales made at Burley separately from the total, it would seem also that consideration should be given to the fact, which is established by the record, that the services performed by the claimant, as stated in the referee's decision, "consisted of approximately forty-five percent in washing operations and fifty-five percent in grading operations at the Burley warehouse." Since the new evidence submitted by the claimant shows that neither of these operations was performed in the warehouse respecting potatoes sold locally, the conclusion would seem to be inevitable that his services related solely to the potatoes (sixty percent of the total handled) which were shipped directly or indirectly to wholesalers and dealers located at distant points from Burley, Idaho, and that his services, therefore, were performed prior to the delivery of the potatoes to a terminal market, and "as an incident to the preparation of such * * * vegetables for market" (Supp. Tr. 77–78).

III

If the Facts Found by the Administrator do not Support His Conclusion Herein, the Case Should be Remanded to Him With Directions to Take Additional Testimony and Make Additional Findings of Fact

We believe that we have shown that it is immaterial, in the instant case, whether title to the potatoes handled by Albert Miller and Company passed to

it before or after they were sorted and graded by it; nor is it material at what time or place or in what condition the ordinary potato grower customarily parts with his economic interest in his potatoes. We have shown also that the warehouse of Albert Miller and Company is not a terminal market within the meaning of Section 209 (1) (4) of the Social Security Act. If, however, this court should be of the contrary opinion, we respectfully suggest that it remand the cause to the Administrator with directions to take additional testimony on the basis of which the facts necessary to a decision of this case may be found.

At the hearing before the referee, which took place before the *Burger et ux.* case was decided by the District Court, it was assumed that "preparation for market" meant preparation for sale to consumers and that it was immaterial whether Albert Miller and Company acquired title to the potatoes before or after they were sorted and graded. Consequently, the referee made no finding on the question whether there was a variation in price between U. S. No. 1 and U. S. No. 2 potatoes; whether, under the agreements between Albert Miller and Company and the growers whose potatoes it handled, the former paid for them before or after they were sorted and graded; whether the price paid by the company was the price of graded potatoes less its fee for washing, sorting, and grading them, or the price of unwashed and ungraded potatoes. Nor does the record disclose in what form or condition potatoes are customarily sold or disposed of by the ordinary producer or grower.

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While the referee said that "It is customary in the production of potatoes in the district in which the company's warehouse is situated for the farmers to harvest their potatoes and place them in storage cellers.", there is no finding as to how widespread is the custom of selling potatoes before they are washed, sorted, and graded.

The record does not disclose the dimensions or locations of the district referred to by the referee; whether there were any other warehouses within a reasonable distance of Albert Miller and Company which bought, washed, sorted, and graded potatoes; and whether or not other potato warehouses or handlers in Idaho or elsewhere bought potatoes on the same conditions as Albert Miller and Company. There is a complete absence of evidence as to how potatoes were handled outside of the district in which the company's warehouse was located from which it could be determined how or when or in what condition the ordinary potato grower customarily parts with his economic interest in his potatoes. We believe that if that is material, it depends on what the majority of growers all over the country customarily do. In the instant case the record does not contain the evidence necessary to make findings on these facts. If the court believes that they are material to the decision of this case, it should remand the cause to the Administrator for the purpose of taking testimony and making findings of fact with respect to them. *Cf. P. M. Barger Lumber Co.* v. *Whitehouse et al.,* 182 F. (2d) 775, 779 (C. A. 9, 1950).

We believe, therefore, that unless this court overrules *Miller* v. *Burger*, it should (1) state more clearly

than it has done heretofore what it meant by "all services performed for the account of the producer or grower in connection with * * * preparation of the commodity for and delivery to a producers' or growers' market in the form or condition in which such commodity is customarily sold or disposed of by the ordinary producer or grower thereof;" (2) that the cause be remanded to the Administrator with directions to find the facts on the basis of which the questions of law and fact involved herein can be decided.

CONCLUSION

For the reasons hereinabove stated, this court should reverse the judgment of the District Court with directions to enter judgment for the defendant or should remand the cause to the Administrator with directions to take additional testimony and make additional findings of the fact on the issues which it now holds to be material to the decision of this case.

Respectfully submitted.

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APPENDIX A

Extracts from the testimony introduced at the Hearings Relative to the Social Security Act Amendments of 1939 Before the Committee on Ways and Means, House of Representatives, 76th Cong., 1st Sess.

Extract from statement of Samuel Fraser, Representing the International Apple Association (pp. 1681–1682).

> In the case of the fruit and vegetable grower the apple on the tree or the vegetables in the field are of no value until they are put in position to ship. In the case of apples, in order to meet food and drug requirements, the spray must be taken off to a point that will meet the tolerance established by law. That may necessitate washing. They must be packed and marked to conform with United States grades to meet the requirements of the United States Bureau of Agricultural Economics grade regulations. They also must be marked to meet the food and drug requirements. To meet present conditions this involves machinery and competent and skilled help. It involves, in the case of a washer for apples at least 5,000 gallons of water every 10 hours, and that must be available in the fall when water is often at a premium.
>
> Now, the larger grower under the definition which is given by the Bureau of Internal Revenue of agricultural labor under the Social Security Act, packing on his own farm may be in a position to establish washing and packing machinery, but the smaller grower is absolutely unable to pack, wash, and prepare for market himself. Therefore a number of them may

either group together to get the work done, or they may sell the commodity to someone who does it. In either of these cases the Bureau of Internal Revenue holds that these latter people are subject to the excise tax.

* * * * *

In other words, the right is given in the present regulation, paragraph (b), to the owner or tenant of a large farmer to pack, package, prepare for market, transport or market the products of said farm, lines 2 to 5.

We want the same rights extended to a group of average producers to get together to prepare their crops for market and have the same opportunities the larger unit now possess.

Extract from the brief of the International Apple Association (pp. 1697–1698).

It is important to remember that *neither the farmer himself,* working his farm and bearing all the burdens of costs incurred in preparing the crop for market and even the transportation charge to market, *nor the labor he employs on the farm,* participate in any of the benefits of this law, but under the present definition and regulation, where the packing and preparation for market are done outside the farm premises, they will be taxed to support benefit payments to others. In much of the agricultural area the possible returns from agriculture are so meager that a tax which will ultimately be 10 percent of the payroll, against which it lies, will but further reduce the returns of a group already inadequately recompensed for the work they render society. It is not social security.

The definition has aroused the most grave apprehensions as to the serious consequences to agriculture.

To illustrate: To produce and turn into money an apple or pear crop, it must, among other things, be pruned, cultivated, fertilized, sprayed, picked, graded and packed and in

many instances washed or brushed. As to washing, the fruit in some cases has to go through two baths, an alkali wash and an acid wash. This necessitates costly machinery, an adequate water supply, a proper method of disposal for the effluent. The average small grower cannot individually perform the work, and, by and large, he cannot equip himself with expensive grading machinery. Under the present regulation, if say five, twenty, or any number combine to erect a packing house, install a washer and purchase grading machinery and then proceed to pack their fruit, they are taxed on the labor employed. In many instances it is not practical for even a large grower, much less a small one, to purchase all of these facilities in view of the uncertainty of a crop from year to year. For example, this year many growers had their entire crop destroyed by spring frosts. In another district, owing to climatic and other conditions, washing may not be necessary and the fruit may be packed on the farm by the producer, without washing.

Again, in the latter instance, it may be advantageous to the small producer to have his fruit packed in a neighborhood packing plant, at a fixed charge per package, rather than attempt to organize both a harvesting and packing crew on his own farm, with the inability of the owner to be in the orchard and the packing shed or house at the same time. Competent packing crews are not easy to get together for a limited tonnage and short employment. Uniformity of grade and pack are essential for the best results.

It should be self-evident that apples or pears hanging on the trees in an orchard are of no value to the grower if they continue to hang there. Something *more* has to be done at point of origin and within the area of production be-

fore the consumer will purchase them and before value can be obtained by the grower. Those necessary additional things are: The fruit must be picked, washed, or brushed when necessary, and graded and packed ready for transportation and delivered to one type of carrier or another. *These acts are all a part of production* just as much as spraying, pruning, fertilization, cultivation, etc.

Formerly they were *all* done on the individual farm or ranch. That can no longer be done. The various steps are too expensive for many growers in view of the uncertainty of the crop or the small volume produced by many of them.

Analyze these steps still further. The fruit is picked from the tree. The labor up to and including that act is now, under the present ruling, agricultural labor. But the picking is still not sufficient. Before the grower can obtain value for his crop, the additional steps of washing or brushing, when necessary, grading and packing, and delivery for shipment must be performed by the grower or by someone acting in his behalf. *And in every single instance the expense of those steps comes out of the pocket of the producer.* Make no mistake about that. If he hires someone either on or off the farm to perform those acts, the grower pays. If someone purchases the fruit with those acts unperformed, the price paid must obviously take those unperformed acts into consideration. The cost of all of those acts comes out of the grower's pocket.

If all of these things are done by the grower *on his own ranch or farm,* he is exempt under the present ruling.

Now then, *if he moves the fruit even a few rods away* from his farm to a central packing plant (whether cooperative or otherwise) *and where the same identical steps are taken* as in the first instance, he is no longer exempt.

This creates an illogical, incongruous, and discriminatory situation entirely unwarranted by the facts.

* * * * *

Second: If he does not select the above method, then he must pay a specific tax on the labor in a central or community packing house, because, most assuredly, this tax will be added to the packing charge.

Whichever method he selects, he will in effect be taxed, *first,* by the expense of equipping himself to do the work, or, *second,* by paying *an out-and-out tax* if he employs someone else to do it.

To restrict by definition and interpretation the term "agricultural labor" to the labor actually performed on the farm itself is an unwarranted violation of the intent of this legislation, contrary to the recognized facts and contrary to the development of agriculture.

The law specifically exempts "agricultural labor." We have shown that the whole process from the bud to the final washing, brushing, grading, and packing at the point of production is all part of one process before the grower can obtain value for his product. This was positively and jointly recognized by Agricultural Adjustment Administration and National Recovery Administration. Their definition was [italics ours]:

"Agricultural workers are all those employed by farmers on the farm where they are engaged in growing and preparing for sale the products of the soil and/or livestock; *also,* all labor used in growing and *preparing perishable agricultural commodities for market in original fresh form.*"

This is confined to point of production or the area of production. We have never contended that it applied or should apply to repacking in consuming markets.

To say that "agricultural labor" stops with the picking of the fruit and leaving it in crates, boxes, or piles on the farm, unwashed, unsorted, or ungraded and not packed, unless the grower does those things himself on the actual farm, is to ignore facts, realities, and the essential steps that fruit growers have had to take in the evolution of production.

We understand that the point has been made that the charge for washing, brushing, grading, and packing in a central packing house would *not* be borne by the producer. It absolutely is and would be borne by the producer and no one else. *And if this tax has to be paid on the labor in a packing house, the grower will pay that.* Not only that, but if the grower sells without performing these acts, then whoever stands in the grower's shoes discounts the price sufficiently to take care of these charges.

The grower is caught going and coming *under the present definition.* If he packs on the actual farm itself, he must equip himself at no small expense and often with lessened efficiency. If he has it done in a central packing house, he pays a tax. In either case the grower pays the bill. Furthermore there is no possibility of the grower passing these taxes on.

There is greater misconception and lack of knowledge about *"passing costs on"* to somebody else or the consumer *in the case of perishable commodities* than almost any other subject. In the case of a perishable, costs *cannot be passed on.* In the last analysis they come out of the grower's pockets. The commodities are *perishable*—they cannot be held from year to year like furniture or any other nonperishable. They have to be sold *for what they will bring.*

Therefore, every additional charge you put on these commodities is a penalty on the grower.

Extracts from brief submitted by Ivan G. McDaniel, representing the Agricultural Producers Labor Committee (pp. 2041–2043).

> The great majority of farm products produced in California and Arizona are either produced and shipped by the farmers directly or through independent packing houses who handle the products for the account of the farmer, or through farmer-owned cooperative packing houses, handling the fruit of its members only. These cooperative packing houses, and in many cases the independent packing house, harvest the products for the farmer, wash, grade, and pack the commodity in such a manner as is required by law, or by good commercial practice. In the cooperative associations the products are generally not sold by the local association which harvests and prepares the crops for market, but after being packed, are turned over to another cooperative which acts as the sales agent therefor.
>
> In these cooperative associations, the products of all members are pooled and after the returns are received, the actual cost of operations, including the labor employed, are deducted from the returns, and the balance distributed to the members. Actually the individual member pays the labor employed in handling the fruit. In many instances the identity of the grower's fruit is not lost as it passes through the house. The associations not only employ the workers used in cleaning, grading, and packing the fruit, but in most instances employ the labor used to pick the fruit on the member's ranch. The association acts as agent for the grower in harvesting and preparing the crops for market; the growers elect a board of directors from their number and the association is entirely controlled by the growers. The character of the product is not changed as it passes through the packing house and when packed is still in its raw or natural

state; the packing houses are located near the farms of its members and furnish the necessary washing equipment which the individual farmer could not afford to buy; they employ the farmers, and the farmers' daughters and sons, and agricultural workers from the nearby community and there is a general practice of exchanging labor between the packing houses and the orchards or vineyards.

The State laws, and good commercial practice, require that the commodities be washed, graded, and packed before they may enter into commercial channels, and the farmer is unable to obtain anything for his product until this work is completed. This work is closely connected to and is an integral part of production operations. The packing house is not an independent commercial endeavor in which the grower is engaged, but is organized to render service which the grower himself would perform on his own ranch were it not for the fact that by the cooperation of several growers the necessary equipment can be obtained and a better grade fruit prepared for market. On the average, the investment of the grower in his packing house is only approximately 4 percent of the investment in his groves. The products after being prepared for market are sold at wholesale and not at retail. The equipment used in these packing houses is not like those used in manufacturing operations where the product is changed in form. The associations generally handle the product from the farms of its own members exclusively. It is and has been for many years a general custom and practice in the fresh fruit and vegetable industry to perform the handling operations in question in order to prepare the products for market.

Where the fruit is handled by an independent establishment the farmer is required to bear the cost. In case the fruit is handled on consignment or upon per unit packing cost incurred by the packing house is deducted

from the funds received from the sale of the fruit. In case the independent operator buys the fruit from the grower, it is the general practice for him to take into consideration and deduct from the price paid, his cost of packing and handling the fruit. It appears from these facts, that the labor used in these packing houses, whether cooperatively or independently owned, and handling the fruit for the account of the grower, is clearly agricultural in nature. Applying the Treasury Department's own tests, as laid down in Digest S. S. T. 125, XVI–14–8630 would establish this fact.

* * * * *

The rulings issued by the Bureau of Internal Revenue are discriminatory. The labor used in a cooperative packing house, where the oranges are cleaned, graded, and packed is not exempt whereas the same labor used in a packing house on the individual farmer's land, employed by the farmer, doing the same kind of work is exempt. This gives the large farm operator a decided advantage over the small operator. The small farmer cannot afford the facilities necessary to handle and pack his fruit, and is therefore required to join a cooperative association where such equipment can be made available. The large farmer on the other hand who has sufficient volume and the funds necessary therefor, can acquire and operate his own packing house. The average-sized citrus grove in a cooperative association in California is approximately 12 acres. The quantity of fruit produced on 12 acres is not sufficient in volume, nor does the fruit bring sufficient returns to permit such a farmer to acquire and operate his own packing facilities.

On the same principle the labor used to pick fruit when employed by a cooperative association is not exempt, whereas the labor employed by a farmer, doing work on the same farm, is exempt. We thus have the anomalous situation

where a workman picking fruit on one part of a ranch, is exempt labor, whereas another workman doing the same work, for the same farmer, on the same ranch, is not exempt.

In many of the cooperative associations, their bylaws or articles, provide that the association is the agent of or trustee for the farmer member, in handling the fruit and the funds realized therefrom. In the ruling made (see (*f*) of par. II above) the Bureau ruled that where the labor was employed by the marketing agent, it was agricultural labor, if the grower by contract appointed the marketing agent, as the agent of the grower in employing the labor used to pick the fruit of the grower. We contend it makes no difference whether this agency relationship is created by contract or by the bylaws, the same principle should apply. However, as we shall hereafter point out, the factor of agency is not material.

* * * * *

(p. 2046) Under present conditions the producers of fresh fruit and vegetables cannot pass on any added tax or labor costs. Their operations are seasonal and when production is at its peak, these producers use the greatest quantity of labor. At that time the quantity of products available for shipment generally forces the prices down to its lowest point so that the farmer when he is getting the lowest price for his products is required to hire the largest number of persons. Furthermore, during the beginning and ending of a particular season there are competing agricultural commodities which generally force the price to a level where the tax cost must be borne by the farmer. Another thing that prevents the farmer passing on his labor and tax costs is that his commodities are perishable and must be moved into market regardless of price or regardless of the quantity of price of competing products. Thus when navel oranges may be

moving from California, large quantities of oranges are moving from Florida and a large quantity of apples are being shipped from various States. The quantity and price of apples, peaches, pears, etc., then competing directly, affect the price on oranges.

The surpluses of fresh fruits and vegetables produced each year have a tendency to keep market prices down and prevent the farmer passing on added costs. As soon as the prices reach a point which cover the production cost plus the cost of shipping, more and more of the surplus is put into the market so that the price has very little chance of reaching a point above the actual cost of production. Furthermore, when surpluses are available there is a tendency on the part of dealers to bid less and buy less. It is what is generally referred to as a buyer's market. The farmer is almost helpless to prevent these surpluses arising. Because of his meager income he must keep his entire property in production to produce a bare living. If the weather is bountiful a surplus is produced and the consumer is generally benefited by lower prices. If growing conditions are adverse due to frosts, winds, dry spells, pests, or other causes the quantity is reduced and the price correspondingly increased. But if the farmer attempted to reduce his plantings and adjust them to the anticipated normal demand and then adverse weather or growing conditions occurred, market famines might result to the great detriment of the consuming public. It is often possible with nonperishable crops to regulate plantings and hold surpluses in storage to prevent shortage through adverse growing conditions. This however cannot be done with seasonal or perishable commodities. Therefore any costs which are added to the farmer's operations, either through social-security taxes, or increased labor costs, must be borne by him.

APPENDIX B

Statutes and Regulations Involved

Title II, Section 205 (g) of the Social Security Act as amended, 53 Stat. 1370, reads as follows:

> Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a)

hereof, the court shall review only the question of conformity with such regulations, and the validity of such regulations. The court shall, on motion of the Board, made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony, upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Title II, Sections 209 (a) and (b) of the Social Security Act as amended (42 U. S. C. 409 (a) and (b), 53 Stat. 1373), read in pertinent part as follows:

DEFINITIONS

When used in this title—

(a) the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of this chapter prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of what-

ever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either * * * except—

(1) Agricultural labor (as defined in subsection (1) of this section; * * *

Title II, Section 209 (l) of the Social Security Act as amended (42 U. S. C. 409 (1), 53 Stat. 1377) provides as follows:

(1) The term "agricultural labor" includes all service performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, stor-

ing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Social Security Administration Regulations No. 3 (Title 20, CFR, 1940 Supp., Part 403, Section 403.808 (e)) provides as follows:

(e) *Services described in section 209 (1) (4) of the Act.*—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of any agricultural or horticultural commodity, other than fruits and vegetables (*see* subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within

the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2), above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the excepted service described

in such subparagraphs must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

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